

Report for Recommendation 95-6

**The Freedom of Information Act and
Confidentiality under the Administrative
Dispute Resolution Act**

Mark H. Grunewald

Associate Dean and Professor of Law
Washington and Lee University
School of Law

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I. Background—Administrative Conference Recommendation 88-11 and the Administrative Dispute Resolution Act of 1990

In the 1980s, the Administrative Conference of the United States (ACUS) adopted a series of recommendations to regularize and promote the use of alternative means for resolving disputes in federal administrative agency practice.¹ The work of the Conference recognized that wider use of informal methods of dispute resolution would require both public and participant confidence in the efficiency and fairness of such processes. A central goal in developing this confidence was assuring that participants would have a hospitable and trustworthy forum in which to undertake to settle administrative disputes and that the public would have a sufficiently visible and accountable mechanism to meet accepted standards of openness in government.

In 1988, in furtherance of this goal, the Administrative Conference recommended a substantial measure of confidentiality for parties and neutrals in alternative dispute resolution proceedings, particularly mediation. This recommendation sought to “encourage the use of alternative means of dispute resolution by appropriate protection to communications between parties and neutrals in settlement negotiations.”² It recognized that “a careful balance must be

¹ Administrative Conference of the U.S., Recommendation 89-2, *Contracting Officers' Management of Disputes*, 1 CFR §305.89-2 (1992); Administrative Conference of the U.S., Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 1 CFR §305.88-11 (1992); Administrative Conference of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR §305.88-5 (1992); Administrative Conference of the U.S., Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR §305.87-11 (1992); Administrative Conference of the U.S., Recommendation 87-9, *Dispute Procedures in Federal Debt Collection*, 1 CFR §305.87-9 (1992); Administrative Conference of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 1 CFR §305.87-5 (1992); Administrative Conference of the U.S., Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR §305.86-8 (1992); Administrative Conference of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 1 CFR §305.86-7 (1992); Administrative Conference of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3 (1992); Administrative Conference of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 1 CFR §305.86-1 (1992); Administrative Conference of the U.S., Recommendation 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*, 1 CFR §305.84-7 (1992); Administrative Conference of the U.S., Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR §305.84-4 (1992); Administrative Conference of the U.S., Recommendation 90-2, *The Ombudsman in Federal Agencies*, 1 CFR §305.90-2 (1992); Administrative Conference of the U.S., Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR §305.82-2 (1992).

² 1 CFR 305.88-11.

struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.³ The recommendation was based upon a report to the Conference by Philip J. Harter, entitled, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality*.⁴ (Hereinafter *Harter Report*) This report surveyed the legal and policy issues surrounding confidentiality in mediation and concluded that while existing law provided some confidentiality protection, there were gaps and uncertainties that left the mediation process without the degree of protection necessary to encourage its use.

The Conference recommendation became the basis for the confidentiality section of the Administrative Dispute Resolution Act of 1990 (ADRA).⁵ This section of the Act provides detailed standards aimed at striking a balance between the need for confidentiality in alternative dispute resolution and principles of openness in government. Subsections (a) and (b) of section 574 extend confidentiality to any "dispute resolution communication,"⁶ except in specified circumstances. A dispute resolution communication is defined as:

any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.⁷

Under subsection (a), a dispute resolution communication in the hands of a neutral is confidential unless:

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

³ *Id.*

⁴ Harter, Philip J., *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, Report to the Administrative Conference of the U.S., 1988 ACUS 839, reprinted in 1 ADMIN. L.J. 315 (1989).

⁵ 5 USC 571 et seq. (1994).

⁶ 5 USC 571 (5) (1994).

⁷ *Id.*

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.⁸

Under subsection (b), a dispute resolution communication in the hands of a party is confidential unless:

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;⁹

Any dispute resolution communication that is disclosed in violation of subsection (a) or (b) is made inadmissible in any proceeding relating to the issues in

⁸ 5 USC 574(a).

⁹ 5 USC 574(b).

controversy with respect to which the communication was made.¹⁰ Parties are permitted to agree upon alternative confidentiality procedures.¹¹ A neutral is required to give notice to parties of any demands for disclosure made upon the neutral by way of discovery request or other legal process.¹² Otherwise discoverable evidence is not protected merely because it was presented in the course of a dispute resolution proceeding.¹³ The confidentiality protection has no effect on the information and data necessary that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.¹⁴ The confidentiality protection does not prevent the gathering of information for research or educational purposes, so long as the parties and the specific issues in controversy are not identified.¹⁵ The confidentiality protection does not prevent the use of a dispute resolution communication to resolve a dispute between the neutral and a party or participant.¹⁶

Taken as a whole, section 574 reflects attention to practical considerations involved in the sharing of information for the purpose of settling disputes as well as public policy considerations based in the possible need for information critical to the legal system or the public health and safety. The detail of the section and the careful balance it strikes suggest a legislative effort to resolve comprehensively the appropriate level of confidentiality for alternative dispute resolution proceedings. In the final stages of consideration of the bill of which the confidentiality section was a part, however, a question arose as to the effect of the confidentiality proposal on the availability of records under the Freedom of Information Act.

II. The Administrative Dispute Resolution Act and the Freedom of Information Act

The question of the relationship between the confidentiality provision of the Administrative Dispute Resolution bill and the Freedom of Information Act arose late in the legislative process and the compromise reached at that late stage was intended to be an interim solution only. The bill that became the Administrative Dispute Resolution Act had been introduced in 1989 by Senator Charles Grassley.¹⁷ The comparable House version had been introduced by Congressmen Glickman and

¹⁰ 5 USC 574(c).

¹¹ 5 USC 574(d).

¹² 5 USC 574(e).

¹³ 5 USC 574(f).

¹⁴ 5 USC 574(g).

¹⁵ 5 USC 574(h).

¹⁶ 5 USC 574(i).

¹⁷ S.971; 135 Cong. Rec. S5166 (daily ed. May 11, 1989).

Pease in the same year.¹⁸ The House bill was the subject of hearings by the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary. That bill was reported by the Committee on the Judiciary on June 1, 1990 and was passed in the House by voice vote on June 5, 1990.¹⁹ The Senate bill was the subject of hearings by the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs. That bill was reported to the Senate floor by the Committee on Governmental Affairs on October 19, 1990.²⁰

On the floor several amendments were made, including the addition to the confidentiality section of a final subsection, (j), which provided:

This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title [exemption 3 of the Freedom of Information Act].

This amendment was proposed by Senator Patrick Leahy. Thereafter, the following colloquy occurred on the floor:

Mr. LEVIN (floor manager of the bill):...[T]here has been some concern and some confusion about the extent to which documents used in and prepared for ADR proceedings are to be kept confidential.... Senator Leahy's amendment...explicitly provides that nothing in this bill is intended to create a (b)(3) exemption under the Freedom of Information Act [FOIA]. That means that any documents involved in a dispute resolution proceeding would be available to the public from a Federal agency to the extent it is permitted under FOIA.

Mr. GRASSLEY: Will the Senator yield?

Mr. LEVIN: I will be happy to yield to the Senator from Iowa and the sponsor of this bill.

Mr. GRASSLEY: Although we have agreed to incorporate these amendments in the bill at this time, I am concerned that this is not the best approach when it comes to mediation, and I hope we will revisit the issue early next year. One of the keys to making ADR proceedings—particularly mediation—attractive and effective is the ability of the parties to

¹⁸ H.R. 2497; 135 Cong. Rec. H2206 (daily ed. May 25, 1989).

¹⁹ See H.R. Rep. No. 101-153, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. H3152 (daily ed. June 5, 1990).

²⁰ See S.Rep. No. 1005, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S18082-18091 (daily ed. Oct. 24, 1990).

be candid with the neutral in an effort to achieve settlement. That candor requires in proceedings like mediation the expectation of confidentiality with respect to the communications prepared for the purpose of the ADR proceeding and given to the neutral in confidence. The provisions in the bill as amended do not, in my opinion, sufficiently address that need for confidentiality.

Mr. LEAHY: Will the Senator yield?

Mr. GRASSLEY: I would be happy to yield to the Senator from Vermont.

Mr. LEAHY: Our staffs have discussed the confidentiality issues involving this bill to some extent over the last few days, but those discussions did not resolve all of the issues. As chairman of the Judiciary subcommittee with jurisdiction over the Freedom of Information Act, I was unwilling to carve out an exception in this bill from FOIA requirements in the final days of this Congress. I think such a step requires more deliberation. I can pledge, however, to the sponsor of this bill, Senator Grassley, that I will be happy to work with him next year on this issue and try to determine whether certain dispute resolution communications should be exempt from FOIA.

Mr. GRASSLEY: I thank the Senator from Vermont and look forward to working with him on this matter next year. I yield the floor.

Mr. LEVIN: Mr. President, I am pleased that we were able, for the purposes of passing this bill this year and getting the ADR process rolling, to temporarily resolve the confidentiality issue. As the Administrative Conference of the United States wrote in its recommendation on this subject, * * * since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.

The provisions in this bill, as amended, do not as yet achieve that balance, and I am pleased that Senators Grassley and Leahy have agreed to address this issue more completely next year.²¹

²¹ 136 Cong. Rec. at S18088 (daily ed. Oct. 24, 1990).

The bill as amended passed in the Senate by voice vote on October 25, 1990.²² The House passed the Senate version of the bill on October 26, 1990 and the President signed the bill into law on November 15, 1990.

Without the Leahy amendment, the confidentiality section would, in all likelihood, have been construed to be a statute within the meaning of subsection (b)(3) of the Freedom of Information Act, which provides an exemption from mandatory disclosure of agency records:

specifically exempted from disclosure by statute (other than section 552(b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.²³

The confidentiality section of the ADRA establishes standards which appear to be "particular criteria for withholding" within the meaning of subpart (B) of Exemption 3.²⁴ In the words of the D.C. Circuit:

a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose in the actual words of the statute (or at least in the legislative history of FOIA)—not in the legislative history of the claimed withholding statute, nor in the agencies interpretation of the statute.²⁵

While it is not entirely clear that prior to the discussions which led to the addition of subsection (j) the proponents of the bill had assumed that the confidentiality section would be deemed an Exemption 3 statute, there is no indication in the legislative history that any exceptions to confidentiality other than those specified in the bill was to be given effect.

In fact, with the exception of subsection (j), the enacted confidentiality section of the ADRA consisted of a detailed set of standards reflecting generally the balance proposed in Recommendation 88-11. It was limited to communications prepared for the purposes of a dispute resolution proceeding. It did not cover the agreement to enter into a dispute resolution proceeding or the agreement or award reached as a result of a dispute resolution proceeding. It did not prevent the discovery or admissibility of otherwise discoverable evidence merely because the evidence was

²² *Id.* at 18091.

²³ 5 USC 552(b)(3).

²⁴ *See Reporters Committee for Freedom of the Press v. Dept of Justice*, 816 F.2d 730, 734-36 (D.C. Cir.), *rev'd on other grounds*, 489 U.S. 749 (1989).

²⁵ 816 F.2d at 735.

presented in a dispute resolution proceeding. It did not have any effect on the use of a dispute resolution communication necessary to document an agreement reached or order issued in a dispute resolution proceeding. It did not prevent the use of a dispute resolution communication necessary to resolve a dispute between a party and a neutral. It permitted disclosure of a dispute resolution communication where all parties to the proceeding consented, where the communication had already been made public or is required by statute to be made public, or where a court determined disclosure is necessary to prevent a manifest injustice, to help establish a violation of law, or to prevent harm to the public health and safety sufficient to justify disclosure. Subsection (j), however, imported into the confidentiality analysis generalized standards for public access not specifically tailored to the needs and objectives of ADR.

Thus, federal agencies began their experiment with new authority to engage in alternative dispute resolution under the ADRA with the issue of confidentiality addressed, but with an unusual twist: a claim for access to a dispute resolution communication, properly framed as a request for an agency record under FOIA, could trump the confidentiality protection of the ADRA.

III. FOIA and Confidentiality Under the ADRA: The Trumping Effect

To evaluate the significance of the trumping effect of FOIA on the confidentiality section of the ADRA, 5 USC 574, it is necessary first to understand how dispute resolution communications may become subject to FOIA disclosure. Only "agency records" are governed by FOIA.²⁶ Dispute resolution communications that are not or do not become agency records cannot be obtained under FOIA. Four general categories of dispute resolution communications may, however, be agency records. First, dispute resolution communications prepared by an agency as a party in an ADR proceeding normally become agency records. Second, dispute resolution communications prepared by a party or nonparty participant in an ADR proceeding which are given to an agency and made a part of the agency's files normally become agency records. Third, dispute resolution communications submitted by any party or participant (including a government party or participant) to a neutral who is a government employee (or in some instances a non-employee who works under the control of an agency) and retained by the neutral normally become agency records. Fourth, dispute resolution communications prepared by a neutral who is a government employee (or again in some instances a non-employee) and retained by the neutral normally become agency records. Dispute resolution communications

²⁶ 5 USC 552(f).

outside these four categories would not ordinarily become agency records and would thus not be subject to FOIA. Their confidentiality would be governed by the terms of section 574. Nevertheless, the four subject categories include a wide range of dispute resolution communications that are common across many agency ADR programs.

If a dispute resolution communication is an agency record, the next question is whether one of the nine FOIA exemptions applies, thus removing the record from the mandatory disclosure requirement. Despite strong policy arguments that generally favor confidentiality to promote settlement, FOIA does not itself contain an exemption, as such, for records of settlement discussion.²⁷ Nevertheless, several exemptions may apply to dispute resolution communications that might for one of the reasons noted above become agency records. The most commonly applicable exemptions would be: Exemption 4 for "trade secrets or commercial or financial information obtained from a person and privileged or confidential,"²⁸ Exemption 5 for "interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,"²⁹ and Exemption 6 for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."³⁰ For certain agency missions, one of the more specialized exemptions may be applicable, such as Exemption 8 for matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."³¹ While each of these exemptions protect important interests, none does so with specific regard to the values at stake in advancing ADR. Moreover, FOIA law is itself complex and voluminous, and both within and without the government, FOIA expertise is rarely found in combination with ADR expertise. Traps for the unwary abound. Portions of records may be exempt, but reasonably segregable non-exempt portions are subject to mandatory disclosure.³² It may even be difficult to anticipate meaningfully at the point ADR is being considered for use what types of information will be communicated in the process. Even if one expects growing judicial interest in ADR to lead courts to consider more generous construction of FOIA exemptions where the successful functioning of an alternative proceeding is at stake, the prospect for change alone would be small comfort to potential users of ADR who must undertake an alternative process under existing law, which particularly in view of subsection (j) gives courts little room to exercise discretion.³³

²⁷ See *Center for Auto Safety v. Dept. of Justice*, 576 F.Supp. 739 (D.D.C. 1983).

²⁸ 5 USC 552(b)(4).

²⁹ 5 USC 552(b)(5).

³⁰ 5 USC 552(b)(6).

³¹ 5 USC 552(b)(8).

³² 5 USC 552(b) (final sentence).

³³ The First Circuit noted in rejecting the assertion of a settlement privilege under Exemption 5:

A central rationale for the confidentiality protection of section 574 was, in fact, the incomplete or uncertain application of existing common law and statutory protection for settlement discussions. The *Harter Report* contains an excellent summary of the possible common law and statutory bases for protecting mediation confidentiality as well as the policy arguments surrounding those protections. These bases for protection all represent departures, of varying degree, from the principle that the "public is entitled to every person's evidence."³⁴ The most important departures are: (1) the common law, relevancy-based, privilege for settlement negotiations,³⁵ (2) the settlement-promoting inadmissibility principle of Federal Rule of Evidence 408,³⁶ and (3) the *Hickman v. Taylor* "workproduct" exception to discovery.³⁷ These protections (and the FOIA exemptions as well) do not represent complete confidentiality protection for dispute resolution communications and, even where arguably applicable, leave considerable uncertainty. Partly in recognition of this uncertainty, there is also, as the *Harter Report* notes, growing movement for recognition of a separate "mediation privilege" either as a matter of common law development or more typically by statute.³⁸

Interestingly, a number of these privileges have been argued to be, and in some cases have been recognized as being, incorporated by one or more of the FOIA

We are sympathetic to the logic and force of this policy plea. The government engages in a prodigious amount of litigation as both plaintiff and defendant. Negotiated settlement is the most efficient means to terminate such disputes. Knowledge that written settlement communications will be available to anyone irrespective of his or her need to know inevitably will to some extent impede this means.

Nonetheless the FOIA's legislative history "emphasize(d) that the law "is not a withholding statute but a disclosure statute...." The purpose of the legislation was to "eliminate" vague statutory phrases that agencies had previously used as "loopholes" for withholding information and "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language...." Consequently courts have repeatedly stated that uncertainties in the FOIA's language are to be construed in favor of disclosure and that its exemptions are to be read narrowly.

* * *

We therefore feel particularly constrained to require that sound policy arguments, however appealing, be grounded in a reading of the statutory language....

County of Madison v. Dept. of Justice, 641 F.2d at 1040.

³⁴ 8 Wigmore, Evidence, §2191-92, 2285 (McNaughton rev. 1961).

³⁵ *Harter Report* at 10.

³⁶ *Id* at 10-13.

³⁷ *Id* at 13-16.

³⁸ *Id* at 20-25. Also compare Lawrence R. Freeman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986) with Eric D. Green, *A Heretical View of a Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

exemptions.³⁹ In these instances, the argument is that through the particular exemption Congress intended, among other things, to recognize an existing legal privilege, at least when the agency records at issue meet the threshold standard for the exemption. For example, Exemption 5, as a threshold matter covers "interagency or intra-agency" memoranda, and has been held to incorporate a broad range of statutory and common law privileges.⁴⁰ Thus where interagency or intra-agency memoranda are at issue, these privileges apply through the exemption. The argument that agency records in the form of written settlement communications made to a neutral or to a party should be viewed as interagency memoranda so as to trigger the privilege-incorporating effect of Exemption 5 has been squarely rejected.⁴¹ On the other hand, where settlement communications exchanged between an agency and a private party contained "commercial or financial" information—the threshold standard for Exemption 4—at least one court treated information as exempt, in effect giving recognition to a settlement privilege even though the "interagency memoranda" threshold of Exemption 5 could not be met.⁴² The confidentiality section of the ADRA provides fresh and explicit congressional recognition of the importance of confidentiality to settlement efforts. This recognition could in turn be argued to warrant application of the policy of section 574 through an exemption where the threshold for the exemption was otherwise met. Ironically, the inclusion of subsection (j) of section 574 makes this construction of FOIA exemptions less likely, thereby possibly exposing dispute resolution communications to less protection under FOIA than other records for which the basis for exemption is, in effect, external common law or statute.

If section 574 were treated as an Exemption 3 statute, the trumping effect of FOIA for dispute resolution communication would be eliminated. The need for balance between openness and confidentiality would be determined under the ADRA. This is not to say that there would not remain substantial issues regarding confidentiality of dispute resolution communications, but these would be resolved by reference to section 574 itself and not to FOIA exemptions. In some cases this might require judicial refinement of the apparent balance struck between openness and

³⁹ This is the case most clearly with Exemption 5. See *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984). There is limited authority for the same approach under Exemption 4. *M/A-COM Information Sys. v. HHS*, 656 F.Supp. 691, 692 (D.D.C. 1986). These courts have, however, recognized the awkwardness of this result as a matter of policy. Moreover, none took account of the modest trend toward the explicit recognition of a settlement privilege. See e.g., *Olin Corp. v. Insurance Co. of N. America*, 603 F.Supp. 445, 449-50 (S.D.N.Y. 1985); *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982).

⁴⁰ 465 U.S. at 800.

⁴¹ *County of Madison v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981); *Center for Auto Safety v. Department of Justice*, 576 F.Supp. 739 (D.D.C. 1983).

⁴² See *M/A COM Information Sys. v. HHS*, 656 F. Supp. 691, 692 (D.D.C. 1986); *NAACP Legal Defense & Educ. Fund, Inc., v. Dept. of Justice*, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985).

confidentiality under section 574. That, however, would be a more focused and likely more productive inquiry for advancing the use of alternative dispute resolution than can be had under the analysis required by using existing FOIA exemptions.

IV. FOIA Trumping of ADRA Confidentiality: The Chilling Effect

In the roughly four years that the Administrative Dispute Resolution Act has been effective, there have been no officially reported legal challenges to confidentiality in federal ADR proceedings. In fact, section 574 has not been the subject of any reported litigation. Similarly, there are no reported post-ADRA cases in which the Freedom of Information Act has been used as the basis for seeking access to dispute resolution communications. The surface calm, however, presents a misleading picture of the significance of FOIA for ADRA confidentiality.

The use of ADR in federal administrative dispute resolution has grown rapidly since 1990, but remains in a relatively early stage of development. While there are many incentives for using ADR, among some agency officials and regulated parties, uncertainty as to the legal or practical effects of using alternative processes appears to deter broader experimentation. In fact, the very premise of Recommendation 88-11, and the central thesis of the *Harter Report*, was that without assurance of a substantial measure of confidentiality parties would be reluctant to participate fully in ADR.⁴³ How then, can one account for the apparent absence of cases contesting confidentiality in federal ADR and the growth of ADR use in the face of the trumping effect of FOIA on section 574 confidentiality protection?

The answer appears to be two-fold. First, section 574 is both a relatively new and a relatively complex statute. In turn, subsection (j) draws into the analysis an even more complex statute with a large and intricate body of caselaw. Only the most sophisticated ADR users are likely to understand the full implications of the relationship between section 574 and therefore, to anticipate the range of confidentiality issues that might arise. As familiarity with the intersection of ADR and FOIA grows and as ADR in federal administrative practice begins to encounter what might be called "second-generation" procedural issues, it is reasonable to expect that confidentiality issues will loom larger in decisions as to whether and to what extent to participate in ADR.

Second, the scope of the problem simply cannot be gauged meaningfully by seeking to identify the number of instances in which confidentiality has become a

⁴³ The importance of confidentiality to ADR is thoroughly presented in the *Harter Report*. No effort is made in this report to retrace what is well documented there. Nor is there any apparent basis on which to conclude that the need for confidentiality has in any way diminished since the date of that report.

contested issue in a federal ADR proceeding. In part, such a number would exclude the potentially large group of cases in which either a party (or, perhaps more troubling, a nonparty) has for lack of sophistication failed to realize that FOIA may be available to gain access to dispute resolution communications. These cases are, in a sense, time bombs which may at any time explode into disenchantment with ADR confidentiality. Even a single case of expected confidentiality being undermined by a FOIA claim could precipitate a damaging loss of trust in the confidentiality of ADR processes. But more importantly, focusing only on the cases in which confidentiality is contested would exclude those instances in which a party (within or without an agency) grasped the general contours of the FOIA issues as they relate to ADR and chose simply, in light of uncertainty about confidentiality, not to pursue the alternative process. There is reason to believe that subsection (j) of section 574 has a chilling effect of this nature on the use of ADR in federal agencies.

Generally agency officials involved in ADR and interviewed for this study observed that, in their agencies and/or in others with which they were familiar, uncertainty about the effect of FOIA on ADR confidentiality represented a deterrent to broader use of alternative dispute resolution processes. In those instances in which the interviewed officials believed this uncertainty had not chilled interest in ADR, the most common further observation was that the effect had not been seen largely because of a lack of party sophistication about the potential problem.⁴⁴ A number of agencies, in reporting formally to ACUS on their experiences with ADR, have taken the position that uncertainty about the effect of FOIA on confidentiality is a serious concern.⁴⁵ Similar concern is reflected in reports and recommendations of professional bodies with an interest in ADR at the federal level.⁴⁶

Even among some agency officials involved substantially in ADR, limited understanding of the potential FOIA issues appears to lead some to convey to parties assurances regarding confidentiality that cannot be met because of the effect of

⁴⁴ The following agency officials familiar with the alternative dispute resolution activities in their respective agencies were interviewed by telephone for this study. They gave only their individual views based on their experience and did not purport to speak officially for their agencies:

David C. Batson, Environmental Protection Agency; Charlotte Caplow, Federal Deposit Insurance Corporation; Rosalie D'Angelo, Department of State; Jeffrey Domber, General Services Administration; Don Greenstein, Department of Justice; Phyllis Hafling, Department of Energy; Ilene Hoffman, Federal Mediation and Conciliation Service; James A. Jones, Department of Labor; Jeff Knishkowy, Department of Agriculture; Renee Landers, Department of Justice; Martha McClellan, Resolution Trust Corporation; Joseph M. McDade, Department of the Air Force; John Settle, Department of Health and Human Services; Patricia Sheridan, Department of Veterans Affairs.

⁴⁵ Letters on file at the offices of the Administrative Conference of the United States.

⁴⁶ Recommendation of the American Bar Association (proposed jointly by the Standing Committee on Environmental Law, the Section on Administrative Law and Regulatory Practice, and the Section on Natural Resources, Energy, and Environmental Law) (1994).

subsection (j). In a number of cases written confidentiality agreements omit entirely reference to the limitations imposed by FOIA. As a result, individual parties participating in ADR may be lulled into a false sense of security with respect to confidentiality, and users of ADR may lose trust in the system generally if at some point an apparent assurance of confidentiality is trumped.

V. Fulfilling the Goals of Federal ADR

To acknowledge that subsection (j) may chill broader use of ADR in federal agencies does not resolve the question left open when the ADRA was passed, as reflected in the Grassley-Leahy exchange on the Senate floor: How should need for confidentiality protection to promote the use of ADR be reconciled with the need for public access to government information as reflected in the policies of FOIA?

One answer to this question may be to structure ADR to minimize the likelihood of entanglement with FOIA in a way that would inhibit use of alternative processes. The most obvious approach here would be to limit reliance on government employees as neutrals. If neutrals are not agency employees, the records they receive or create would not, by virtue of their receipt or creation, become agency records subject to FOIA.⁴⁷ This outcome could be strengthened by terms in the contracts with outside neutrals that make clear that records produced in the ADR proceeding are records of the contractor and not the agency. While FOIA caselaw would still leave some uncertainty about the status of these records, such contractual arrangements at least diminish the directness of a claim that a dispute resolution communication is an agency record.

This approach, however, has several possible undesirable affects. First, the cost of obtaining outside neutrals may in itself deter the use of alternative processes. Second, agency employees with substantive expertise in particular areas may, for some forms of ADR, be better suited to conducting ADR than an inexperienced outside neutral. Third, using only outside neutrals may undermine the "acceptability" to the parties' standard of ADRA. Finally, and perhaps most importantly, this approach does not answer, but instead avoids, the question of how public access policy should accommodate the needs of ADR by making openness and confidentiality turn on the essentially irrelevant matter of the status of the person serving as the neutral.

A second answer may be to develop a records management policy with respect to ADR that ensures that dispute resolution communications that are not necessary to retain as records of agency functions are disposed of as soon as they no longer serve an immediate purpose in the ADR proceeding. This practice is followed in many agencies. While the approach has considerable utility, again it avoids the central question of how ADR policy and FOIA policy should be reconciled and, in some

⁴⁷ See *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

forms, may raise issues under the Federal Records Acts.⁴⁸ In any event, sound federal records management policy should not be skewed simply to meet a need for confidentiality where a more direct approach could serve both purposes.

A third solution may be to develop educational programs that would better inform agency personnel and other potential users of ADR of how the confidentiality protections of section 574 relate to disclosure obligations under FOIA. As noted earlier, in many cases where dispute resolution communications become "agency records," one or more of the FOIA exemptions may apply to protect the record from public disclosure. Potential participants, once better informed about the risk of FOIA disclosure in the circumstances of a particular dispute and the records it is likely to generate, may decide that sufficient protection is in fact available. Establishing a better understanding of the relationship of FOIA to ADR is independently a desirable objective. But since by definition it seeks only to establish an understanding of the existing relationship, it does not address the problem of possible gaps in protection needed for ADR.

A fourth solution may be to develop a litigation strategy to promote ADR-favorable judicial interpretation of FOIA exemptions. As noted earlier, recognition of a settlement privilege as a component of a FOIA exemption has generally met judicial resistance. With the growth in acceptance of the importance of ADR, there may be a greater willingness on the part of the courts in appropriate cases to apply a settlement privilege. Similarly, general interpretation of the FOIA exemptions may have beneficial effects for confidentiality in ADR. For example, the relatively recent *en banc* decision of the D.C. Circuit in *Critical Mass Energy Project v. NRC*⁴⁹ reduced the burden for invoking Exception 4 protection for "commercial or financial information" submitted "voluntarily" to an agency. Nevertheless, surprising subtlety in FOIA caselaw may limit the utility of this decision to protect dispute resolution communications, on the theory that while the decision to participate in ADR may be voluntary, once a party has agreed to participate submission of information in the process is no longer "voluntary" within the meaning of *Critical Mass*.⁵⁰

A fifth answer would be to amend subsection (j) of section 574 to tailor its approach to FOIA to the need for confidentiality in ADR. Under this approach subsection (j) would be amended to express some limited form of protection from mandatory disclosure for agency records that are also dispute resolution communications. This approach would be directly responsive to the question of how to reconcile ADR confidentiality policy and public access policy. It would, however, treat the two policies as distinct. With the exception of subsection (j), Congress adopted in section 574 a comprehensive scheme to balance the need for

⁴⁸ 44 USC 2901 et seq. (1994).

⁴⁹ 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S.Ct. 1579 (1993).

⁵⁰ Cf. FOIA Update, Vol. XIV, no. 2; pp. 3-5 (U.S. Dept. of Justice, Office of Information and Privacy (Spring 1993)).

confidentiality in ADR with the need for openness in government. The balance struck may be viewed by some as being too solicitous of the interest of confidentiality or by others as unduly protective of the interest of openness in government. But the balance is of precisely those interests that shape public information policy throughout government. If amendment is in order, then, it would seem that it should be in the substantive provisions of section 574, not in the subsection that serves only to preclude giving Exemption 3 effect to the terms of that section. Yet nothing in the legislative history of section 574 or in the interim legislative compromise that led to the addition of subsection (j) identifies a particular flaw in balance struck.

A sixth answer would be to repeal subsection (j). To do so would be, in all probability, to give section 574 effect as an Exemption 3 statute. Alternatively, this result could be accomplished with greater certainty by amending subsection (j) to provide explicitly that section 574 is to be construed as an Exemption 3 statute. While this approach would not address possible concerns that section 574 is too broad or too narrow in the protection it affords dispute resolution communications, it would focus the confidentiality issue on a single statutory provision enacted specifically to meet ADR needs and allow development of the law to proceed in this context. Judicial interpretation of section 574, as so amended, would presumably take place with a recognition that the substantive provisions of the statute seek to balance the need for confidentiality in ADR against the need for openness in government. It would not mean that all uncertainty regarding confidentiality would be resolved. It would mean, however, that a single, purpose-specific, statutory framework would be used for resolving ADR confidentiality issues and that agency officials and participants in ADR could rely on a unitary policy in planning and implementing informal administrative dispute resolution processes.

VI. Conclusion

The addition of subsection (j) to the confidentiality section of the ADRA has created a narrow, but significant, problem in accomplishing fully the purposes of the Act. In those circumstances in which dispute resolution communications become "agency records" within the meaning of FOIA, the confidentiality of the records is determined not by the provisions of section 574, but rather by the terms of the exemptions to FOIA. For users of ADR, the trumping effect of FOIA in this class of cases means that confidentiality is not governed by the careful balance struck in section 574 but rather by the complex body of FOIA law which accords essentially no protection for dispute resolution communications on the basis of the process needs of ADR. While some dispute resolution communications that become agency records, for example because they come under the control of a government-

employee neutral, may be exempt from mandatory disclosure under FOIA, the scope of the exemptions and possible gaps in coverage leave, at a minimum, uncertainty as to the confidentiality of such records.

This uncertainty, in turn, can become a disincentive to the use of ADR. Even though the ADRA has been in place for only four years, there is reason to believe that, particularly among sophisticated potential users of ADR, concern about the impact of FOIA on confidentiality has had a chilling effect on the use of ADR and that the effect could be even more substantial either if less sophisticated potential users were aware of the gap in protection or if a case arose in which expected confidentiality was undermined by a FOIA claim. While the problem can be controlled to some extent by greater use of non-governmental neutrals or by strict policies that avoid the preservation of records, these limited solutions may impose additional costs on the use of ADR and may undermine other important ADR objectives. To accomplish the ADR use-promoting objective of Recommendation 88-11, the confidentiality standards of section 574 should be given effect with respect to all covered dispute resolution communications even where those communications become an agency record under FOIA. Agencies and other parties proceeding under the ADRA should not, however, be free to use the "agreed to" alternative confidentiality procedures permitted by subsection (d) of section 574 to provide a broader FOIA exemption than would be available under the specific terms of section 574.⁵¹ In short, the standards of section 574 should be allowed to operate as the governing standard for confidentiality in federal administrative dispute resolution.

Recommendation

The confidentiality section of the Administrative Dispute Resolution Act, 5 USC 574, should be amended to provide that the section is a statute specifically exempting records from disclosure under Exemption 3 of the Freedom of Information Act, 5 USC 552(b)(3), and to further provide that alternative confidentiality procedures agreed to under section 574(d) shall not, for purposes of Exemption 3, be construed to provide broader confidentiality than otherwise available under section 574.

⁵¹ See *supra*, note 11 and accompanying text. If section 574 were treated as an Exemption 3 statute, it is possible that an agreement reached among parties for alternative confidentiality procedures under subsection (d) could be argued to be entitled to respect as part of the FOIA exemption. While for non-FOIA purposes there is no reason that such agreements should not be given effect, to permit them to control FOIA outcomes gives unwarranted control to agencies and parties to set public access standards.

Appendix

5 USC § 574 (1994)

§ 574.

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication, unless—

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such communication is disclosed only to the extent necessary to resolve such dispute.

(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.

